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Consideration of issues in the area of insolvency law

Finalization and adoption of a model law on cross-border recognition and enforcement of insolvency-related judgments and its guide to enactment

Compilation of comments on the draft model law on the recognition and enforcement of insolvency-related judgments as contained in an annex to the report of Working Group V (Insolvency Law) on the work of its fifty-second session (A/CN.9/931)

Addendum

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II. Compilation of comments [*continued A/CN.9/956*]

A. Governments [*continued*]

10. Sri Lanka

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General Comments

- The term insolvency is not used in Sri Lankan law to define the final outcome of a proceeding (e.g. section 273 (2); section 278 of the Companies Act). In Sri Lanka, companies are wound up for several reasons, e.g. a company being unable to pay its debts. It is assumed the word "insolvency" is used to refer to a situation where a company is unable to pay its debts. However, there are several other grounds on which a company can be wound up in Sri Lanka. These include situations where the company is not insolvent. Therefore, Sri Lanka suggests that a definition of insolvency be included in order that a Sri Lankan court can assess whether a judgment in respect of which recognition and enforcement is sought, is consistent with the laws of Sri Lanka.
- It is also noted that the term "reorganization" used in the treaty is not a concept that is legally recognized in Sri Lanka. Therefore, it is recommended that "reorganization" be defined for the same reasons as mentioned above in requesting a definition for "insolvency".
- Judgments sought to be enforced or recognized under the treaty should necessarily be final judgments. If the purpose of the treaty is to avoid duplication of proceedings, finality on issues ought to be reached in one country prior to seeking enforcement/recognition in another. Therefore, Sri Lanka should recommend that the Working Group consider the implications of seeking recognition or enforcement of judgments which are not final, and suitable amendments.
- It is also noted that the rights of creditors in the country where recognition and enforcement is sought should be preserved and enforcement and recognition of insolvency related judgments should not be permitted if the creditor's rights in that country would be violated in the process. Sri Lanka requests that the Working Group consider this aspect of rights of creditors and make suitable provision to protect the creditors right and not conflict with the same.

Comments on Articles of the Model law

Paragraph 2 of the Preamble

It is recommended that the following provisions be added.

(e) To restrict, suspend or interfere with or prejudice in any way insolvency proceedings in the State in which recognition is sought.

(f) To prejudice the rights of creditors in the country in which the judgment is sought to be enforced.

Article 1 – Scope of Application

It is recommended that the following provisions be added.

"(2) This law does not apply to insolvency related judgments where parallel proceedings have commenced in the country which the judgment is sought to be enforced."

Article 2 – Definitions

(a) The reference to administrative proceedings is not appropriate given that they do not culminate in a judgment. This reference should be removed or qualified.

Please see General Comments above on interim proceedings and reorganization. Accordingly, necessary changes ought to be made to this definition.

(b) The reference to "administer the reorganization" should be removed as it is not part of judicial proceedings.

(c) The reference to administrative authority is inappropriate and should be removed. It is unclear how to define whether or not 'administrative decision has the same effect as a court a decision". Clarification should be sought on how an administrative decision has the same effect as a judicial decision.

As already noted above under General comments, it is essential that the definition of a judgment is limited to a final judgment, maybe subject to review by appellate courts, but not wide enough to encompass an interim order/award, etc.

(d)(i)(a) The term "whether or not that insolvency proceeding has closed" denotes that the judgment may be an interim order and not a "judgment" which is a term used under Sri Lankan law to refer to the final outcome of a case, from which an appeal or review mechanism to appellate courts may or may not be available. As already highlighted reference to interim orders should be removed.

Proposed new addition between Article 3 and 4

New Article

"To the extent that this law conflicts with the Constitution of a State, the Constitution of the Country in which the enforcement is sought will prevail."

Article 5

The purpose of this Article is unclear; e.g. what is the function of the person/body authorized to act in another state; whose interests does that person or body represent.

Article 7

The Court should also be entitled to refuse to take action where the action could be contrary to the fundamental principles of the laws of the State in which the recognition and enforcement is sought.

Article 8

A proviso should be included to Article 8 as follows; "provided that such interpretation is consistent with the laws in the State in which the judgment recognition and enforcement is sought."

Article 9

A time bar should be included for the purposes of this model law. Time should commence to run from the point at which the judgment (with regard to which enforcement and recognition is sought) is delivered in the originating State.

Article 10

The procedural laws in the country in which recognition and enforcement is sought should apply.

Article 11

Procedural laws relating to the grant of provisional relief will be the laws of the country in which recognition and enforcement is sought.

Article 13

It is recommended that the following provisions be included as additional grounds for refusing enforcement.

Where the effect of recognition would be:

To restrict, suspend or interfere with or prejudice in any way insolvency proceedings in the State in which recognition is sought.

To prejudice the rights of creditors in the country in which the judgment is sought to be enforced.